# SIXTH DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

---

Case No. 6D23-384
Lower Tribunal Nos. CT21-004148-BA, MM21-004499-BA,
CT21-006614-BA and CT21-004150-BA

---

ANDREW SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

---

Appeal from the County Court for Polk County.
Robert E. Griffin, Judge.

June 9, 2023

COHEN, J.

Charged with DUI, Andrew Smith ("Smith") accepted a plea agreement and pled nolo contendere to reckless driving under section 316.192, Florida Statutes

(2021).[1] Pursuant to that agreement the trial court placed him on probation for twelve months. Smith argues here that the sentence was illegal. He is correct.[2]

The maximum term of imprisonment for a first-time reckless driving conviction is ninety days.[3] § 316.192(2)(a), Fla. Stat. (2006). Because the term is less than one year, reckless driving is a misdemeanor. *See* § 775.08(2), Fla. Stat. (2021). Section 948.15(1), Florida Statutes (2021), reads, "A defendant found guilty of a misdemeanor who is placed on probation shall be under supervision not to exceed 6 months . . . ." The one-year probation ordered by the trial court was illegal.

As part of the agreement, the court found that alcohol was a contributing factor to the reckless driving. This invoked the provisions of section 316.192(5), which provides,

> In addition to any other penalty provided under this section, if the court has reasonable cause to believe that the use of alcohol, chemical substances set forth in s. 877.111, or substances controlled under chapter 893 contributed to a violation of this section, the court shall direct the person so convicted to complete a DUI program substance abuse education course and evaluation as provided in s. 316.193(5) . . . .

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

[2] We have jurisdiction. Art. V, § 4(b)(1), Fla. Const.

[3] Under the plea agreement, Smith was to be treated as a first-time offender.

While this subsection requires the court to order the defendant to undergo certain remedial measures commonly ordered in DUI cases, it does not address probation.

Section 775.081(2), Florida Statutes (2021), provides, "Any crime declared by statute to be a misdemeanor without specification of degree is of the second degree," making first-time reckless driving a second-degree misdemeanor. In *Smith v. State*, 484 So. 2d 581, 582 (Fla. 1986), the Florida Supreme Court held that a court is permitted to order a six-month term of probation for a second-degree misdemeanor, even though six months might exceed the maximum period of incarceration.[4] Therefore, the maximum probationary term for first-time reckless driving is six months.

Smith relies on *Fonteyne v. State*, 855 So. 2d 99 (Fla. 2d DCA 2003), which held that the probationary term for first-time reckless driving may not exceed the maximum term of incarceration of ninety days.[5] We decline to follow *Fonteyne*.

We recognize that Smith's probation was ordered as part of a plea agreement; nonetheless, a court may not impose a term of probation beyond the maximum authorized by statute, even if done pursuant to a plea agreement. *See Tucker v. State*,

[4] The court observed, "This is the only degree of crime for which the maximum time for probation is greater than that for imprisonment." *Smith*, 484 So. 2d at 582.

[5] Believing that *Fonteyne* controlled in this case, the State confessed error.

174 So. 3d 485, 487-88 (Fla. 4th DCA 2015); *Haynes v. State*, 106 So. 3d 481, 482 (Fla. 5th DCA 2013).

This opinion should not be read that a one-year period of probation could never be imposed in reckless driving cases. The plea agreement and the trial court's order indicated that the reckless driving conviction was to include a finding that alcohol "contributed to" the commission of the offense, invoking section 316.192(5). This appears to reflect an effort to impose all the typical DUI penalties without placing a DUI on the defendant's criminal record. Perhaps because one year of probation is permitted for a DUI, the parties assumed that a one-year probation was permitted when a DUI is reduced to reckless driving. However, section 316.192(5) does not address or modify the allowable period of probation. To impose a probationary term in excess of the six months permitted under 775.08(2) for a first-time reckless driving conviction, the trial court would need to rely on section 948.15(1).

Section 948.15(1) provides,

> A defendant found guilty of a misdemeanor who is placed on probation shall be under supervision not to exceed 6 months unless otherwise specified by the court.
>
> * * *
>
> In relation to any offense other than a felony in which the use of alcohol is a significant factor, the period of probation may be up to 1 year.

Thus, section 948.15(1) permits the extension of probation to one year if alcohol was a "significant factor" in the commission of the offense. In this case, the trial court neither made such a finding nor accepted such a stipulation. A "contributing" factor is not the equivalent of a "significant" factor. When a court intends to use the statute to increase the allowed term of probation, it must make a finding or accept a stipulation that alcohol was a "significant factor" in the commission of the offense.[6] Had the plea agreement in this record included a stipulation that alcohol was a "significant factor" in the commission of the offense, a one-year probation would have been permitted under section 948.15(1).

However, that does not end our inquiry. Because this was a negotiated plea, Smith may not seek relief under Florida Rule of Criminal Procedure 3.800(b)(2). His remedy is to seek to withdraw his plea. *See Tucker*, 174 So. 3d at 487-88 (citing *Haynes*, 106 So. 3d at 482). Accordingly, we affirm the denial of Smith's rule 3.800(b)(2) motion without prejudice to his right to file an appropriate Florida Rule of Criminal Procedure 3.850 motion.[7]

---

[6] When charged with DUI, to secure a reduced charge, defendants might be willing to stipulate to a finding that alcohol was both a contributing and significant factor in the offense. For a trial court to make such a finding without a stipulation potentially implicates constitutional issues concerning the right to trial by jury. *See Brown v. State*, 260 So. 3d 147 (Fla. 2018) (following *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

[7] For this reason, we do not find a need to certify conflict with *Fonteyne v. State.*

AFFIRMED.

STARGEL and WHITE, JJ., concur.

Howard L. "Rex" Dimmig, II, Public Defender, and Clark E. Green, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and James A. Hellickson, Assistant Attorney General, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED